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SUBJECT: DEMARCHE ON WIPO ISSUES: 2010-2011 BIENNIUM  
BUDGET AND IGC MANDATE RENEWAL

11. SUMMARY: The interventions made by Geneva-based representatives from Algeria, Egypt, Pakistan, Nigeria and South Africa concerning the 2010-2011 biennium Program and Budget of the World Intellectual Property Organization (WIPO) are of concern to the U.S. and may jeopardize a positive consensus recommendation of the proposed budget at the September 14-16, 2009, Program and Budget Committee meeting. Such comments appear to micromanage internal policy issues, alter the mandate of substantive committees, and violate WIPO policy not to use reserves for recurring expenditures for Development Agenda programs, as opposed to only using reserve funds for capital investments. Washington agencies request that these posts demarche appropriate officials from Intellectual Property Offices and/or Foreign Affairs Ministries using suggested Talking Points in Para 6. Post should also use the opportunity to raise the importance of renewing the mandate of the WIPO Intergovernmental Committee (IGC) on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (GRTKF) by the WIPO General Assembly at its September 22-October 1, 2009, meeting using suggested Talking Points in Para 7. In addition, the points in Paras 6 and 7 have been turned into a non-paper, which is included in its entirety in Para 8. In addition to delivering the verbal demarche, as nuanced appropriately for your host country, it would be appropriate to provide this non-paper to host country officials. Please provide responses of the foreign government officials by September 10, 2009. END SUMMARY.

#### BACKGROUND

12. At the informal meetings of WIPO,s Program and Budget Committee on July 20)22, 2009, certain Geneva- based developing country representatives presented a hard-line position that their comments must be reflected in the revised Program and Budget of 2010-2011 biennium for the budget to pass. WIPO has presented a balanced budget with expenditures for 2010 and 2011 totaling over 618 million CHF and 203 million CHF in reserves (surplus income generated by WIPO,s fee-based services for the private sector). A balanced 2010-2011 budget is a challenge, as WIPO,s income level (which funds over 90% of WIPO,s budget) has been reduced due to the economic crisis. The proposed program and budget for 2010-2011, nonetheless, has avoided going into deficit while allocating sufficient resources to meet WIPO,s international legal obligations in the processing of patent, trademark and industrial design applications as well as allocating generous resources to meet Member State expectations for program delivery, including Development Agenda (DA) activities.

13. While it appears that the comments made by certain Geneva-based representatives of developing countries largely stem from a concern over the implementation of WIPO,s Development Agenda programs, these concerns are unfounded. The DA consists of 45 recommendations that require a wide range of actions for implementation, from concrete development-oriented projects and activities to the application of certain principles and objectives that should continue to guide the work of the Organization. The

Organization has embarked upon a structured approach to mainstream and integrate the Development Agenda recommendations into all its substantive programs. As a result, the Development Agenda has brought significant change to the institutional culture of WIPO, as it has put development at the heart of the activities conducted by the Organization. For example, DA resources are included in the budget and program of WIPO, including as specific line items in the budget for development activities implemented across the Organization, and a new division (the Development Agenda Coordination Division\*DACD) has been created to ensure coordination of the implementation of the Development Agenda, which will report directly to the new Deputy Director General for Development.

14. Nonetheless, certain countries have argued that: 1) the Director General should directly oversee the implementation and coordination of the DA, not the new division created for that purpose; 2) Extra budgetary resources (Member State or other outside contributions) should not be used to fund DA activities and certain Member States seek to draft policy guidelines on how WIPO should use extra-budgetary resources; 3) The description of programs concerning copyrights, patents and traditional knowledge should include work that has not been agreed to by the substantive committees related to these issues; and 4) The budgets of programs and activities related to development and the Development Agenda should be increased using reserve funds (as there is an income projection of zero growth during 2010 and 2011 because of the economic crisis), even though such funds must only be used for one-time capital expenditures, not operating expenditures.

15. In raising the upcoming Program and Budget Committee (September 14-16) and General Assembly (September 22-October 1) meetings, Post should take the opportunity to ensure that these same countries support renewal of the mandate of the Intergovernmental Committee (IGC) on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (GRTKF). Member States at the 14th session of the WIPO IGC, held in Geneva from June 29 to July 3, 2009, failed to reach an agreement on a recommendation to the 2009 WIPO General Assembly (GA) to renew the mandate of the IGC. The week-long, contentious deliberations were based on a proposal submitted by the African Group, which called for "text-based negotiations" in the period between 2009 and 2011, leading to the submission of a text of an "internationally legally binding instrument(s)" for the protection of GRTKF to the 2011 GA. The African Group proposal also set forth demands for convening six "intersessional working groups" in the next two-year period, which, according to the WIPO Secretariat, would nearly triple the proposed 2010-11 budget for the IGC. The United States, along with other developed countries, supported the renewal of the IGC mandate and offered a number of amendments to the African Group proposal. However, the negotiations collapsed late in the week when it became clear that the key elements of the African Group proposal were non-negotiable. As a result, the question of the renewal of the IGC's mandate has been left to the September 2009 WIPO General Assembly. The U.S. seeks to avoid a repeat of IGC 14 at the GA, and hopes the IGC mandate can be renewed without a call for a vote at the GA. The U.S. is concerned about the hard-line position in seeking an internationally legally binding instrument in 2011 given the lack of substantive process on these issues. The U.S., other developed countries, as well as South Korea and Singapore, believe that it would be premature to agree upon the nature of the text to be negotiated without an understanding of the contents. While the U.S. and others also maintain that no outcome of the IGC should be precluded, including the possibility of a legally binding international instrument, we likewise believe that the final outcome cannot, at this point, be prejudged to mandatorily include an internationally legally binding agreement.

16. SUGGESTED TALKING POINTS: PROGRAM AND BUDGET COMMITTEE  
FOR Algeria, Egypt, Pakistan, Nigeria and South Africa:

Program and Budget Committee meetings at the World Intellectual Property Organization (WIPO) are scheduled for September 14-16, 2009. The focus will be to establish WIPO's budget for the 2010 and 2011 biennium. Based on interventions made by your delegation and some other countries during the July 20-22 informal budget meetings, the U.S. is concerned about whether consensus will be reached in September on a balanced and deficit-free budget.

The U.S. hopes for successful program and budget meetings in September so that the budget can be passed and WIPO can implement programs that are essential in fostering innovation and economic development for all Member States, including developing and least developed countries.

The U.S. hopes that your government will help ensure that consensus is reached. In particular, the following positions that will hamper consensus are those that seek to:

- ¶1. Micromanage the Director General's role in coordinating the Development Agenda and the use of extra-budgetary resources;
- ¶2. Alter the mandate of the work of substantive committees, which is not the responsibility of the Program and Budget Committee but the responsibility of the General Assembly and the actual committees themselves; and
- ¶3. Go against WIPO's policy not to use reserve funds for any recurring program expenditure, rather than capital expenditure. The Development Agenda-related programs are considered recurring expenditures as these programs are at the heart of WIPO's on-going activities and objectives.

On the Director General's role in coordinating the implementation of the 45 Development Agenda recommendations, the DG has indicated that he will continue to remain actively involved in WIPO's implementation of the Development Agenda even though a new structure has been created to ensure that the 45 recommendations are mainstreamed and coordinated in the Organization. The new structure, called the Development Agenda Coordination Division (DACD), coordinates the implementation of the Development Agenda recommendations within WIPO, is the interface with external stakeholders, and promotes better understanding of the Development Agenda and its benefits. The DACD reports directly to the new Deputy Director General for Development (Mr. Geoffrey Oneyama from Nigeria) of the Organization.

Demands for replacing the DACD with the DG to coordinate the Development Agenda are unproductive, as this is an internal-WIPO staff coordination issue, not an intellectual property policy issue requiring Member State approval. Further, such demands may hamper the broad, multi-level coordination of the Development Agenda which is sought by Member States, including developing countries, and would be created under the new DACD structure.

When raising with Egypt, highlight this as an Egyptian proposal: In addition, the US hopes to avoid debate on the development of guidelines for the use of extra budgetary resources. There appears to be some concern from certain countries that such resources will be used to fund development agenda projects, and that Member States should therefore embark on developing specific guidelines for WIPO concerning the use of these funds. The U.S. notes that the income which WIPO generates through its fee-based registration services largely funds Development Agenda programs. As noted in the draft Program and Budget document, extra-budgetary resources will only be used in the context of a specific Development Agenda recommendation that seeks to increase donor activity for LDCs in the IP and development arena.

Demands that guidelines be developed on how WIPO uses extra budgetary resources are unnecessary since the Development Agenda is a recurring cost for WIPO and therefore cannot rely on non-fixed, voluntary resources such as

donations. Further, such demands are unproductive, as the manner in which extra budgetary resources are used are established by WIPO's Financial Division. Based on WIPO's Financial Rules and Regulations (Rule 103.1), only in the case where the use of these funds would trigger a liability issue for the Organization is Member State approval required.

On the use of reserve funds to increase the allotment of resources for the Development Agenda, the US notes that the proposed budget for the Development Agenda projects, which includes the implementation of 8 recommendations that have been approved by Member States, is over 11 million CHF. Development activities that are occurring throughout the various programs in WIPO are over 117 million CHF, which is over 19 percent of the proposed budget. A significant level of funding is already available for the Development Agenda.

Demands that the reserve funds be used for Development Agenda projects are unnecessary as the project managers who are appointed with responsibility to implement individual projects have noted the human and financial resources required to implement these projects. These budgets are then approved throughout the Organization, including the Development Agenda Coordination Division and the Director General. Based on the financial data provided to the Committee on IP and Development (the committee responsible for overseeing implementation of the 45 recommendations) and the Program and Budget Committee, the budgets for 8 recommendations have been allotted in the draft budget without requesting the use of reserve funds.

Moreover, the use of reserve funds for non-capital expenditures would not be fiscally responsible. To date, WIPO is receiving less funding from fee paid services to the private sector due to the economic crisis. In addition, WIPO will have to fully implement new UN accounting standards\*International Public Sector Accounting Standards (IPSAS) during the course of 2010. This implementation will require a significant overhaul of WIPO's accounting and finance system, which will have significant budgetary implications on WIPO's reserves. These two additional variables will impact the level of reserves and their magnitude remains unclear at this time. As a result, the US is concerned about requests for use of reserves for recurring expenditures which may negatively affect WIPO's financial health.

When raising with Algeria, highlight this as an Algerian proposal: With respect to proposed amendments to program descriptions in the draft 2010-2011 Program and Budget, amendments have been suggested in the program area dealing with copyrights and related rights to include work on access to educational materials. While the issue of access to educational materials has been raised in the WIPO Standing Committee on Copyrights and Related Rights (SCCR) and is currently highlighted in the draft Program and Budget as an issue under debate in the SCCR, Member States have not reached consensus on the degree and scope of work on this issue. Currently, the SCCR is examining a narrow issue concerning improving the access of copyrighted works for visually impaired persons and have not agreed to broaden the scope to include increasing access to educational materials for all people.

We are concerned that an amendment to include a new focus on access to educational materials is prejudicial to the on-going discussions that are occurring in the SCCR.

Relatedly, we are also concerned about suggested amendments in the copyright program area for workshops and additional studies on copyright limitation and exceptions concerning distance education and trans-border distribution of copyrighted materials. The distance education and transborder issues have also been raised at the SCCR. While a study has been approved by the SCCR, Member States have not agreed to any workshops or further studies on these issues.

We urge that the mandate of the SCCR remains within the

purview of the SCCR and not the Program and Budget Committee.

We are also deeply concerned about suggested amendments in the patent program area and other areas to include a specific focus on countries utilizing legislative &flexibilities<sup>8</sup> provided in the WTO Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), as well as a specific reference in the traditional knowledge program area to accelerate work through intersessional meetings of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (GRTKF). Both issues are currently being debated in the relevant substantive committees at WIPO, and therefore no agreement has been reached on whether or how the committees will ultimately address these issues.

We note that specific &TRIPS flexibilities<sup>8</sup> have been identified in a non-exhaustive list of future work for discussion in the Standing Committee of Patents. In addition, the Committee on IP and Development has also discussed on-going WIPO technical assistance activities concerning legislative assistance on the use of legal options and flexibilities, consistent with rights and obligations under the international IP legal framework.

While the draft Program and Budget document references the complexity in which &TRIPS flexibilities<sup>8</sup> operate in the patent system, there is no mandate created for specific work or activity on &TRIPS flexibilities<sup>8</sup>.

We look forward to working with your government at the September 14-16 Program and Budget Committee to ensure approval of a balanced budget to be ultimately sent for further approval to the General Assembly the week of September 22, 2009.

#### 17. SUGGESTED TALKING POINTS: RENEWAL OF IGC MANDATE

FOR Algeria, Egypt, Pakistan, Nigeria and South Africa:

The week of the General Assembly at WIPO will be very busy, especially since the question of the renewal of the IGC's (GRTKF committee) mandate has been left to General Assembly.

The IGC recently completed its fourteenth session. During the session, although there was general consensus within the Committee that the mandate should be renewed, the Committee was unable to agree upon the terms for renewal of the mandate.

Specifically, the negotiations collapsed when it became clear that the key elements of the African Group proposal that call for a legally-binding international instrument for the protection of GRTKF to be negotiated, concluded and signed by Member States in 2012 were non-negotiable.

We note that the IGC has not reached agreement on the scope and contents for such a text, yet the African Group proposal sought to arrive at a conclusion on the legally-binding nature of a text.

The United States came to the 14th session eager to reach consensus on renewal of the Committee's mandate so that progress could be made on the preservation, promotion and protection of traditional cultural expressions, traditional knowledge and genetic resources.

We, like many other delegations, were deeply disappointed that WIPO Member States were unable to arrive on agreed text to renew the mandate of the IGC. The United States continues to maintain that no outcome of the IGC should be excluded, including the possible adoption of a legally binding international instrument. Equally important, we believe that no outcome should be prejudged.

The delegation of the United States will continue to work with other delegations to ensure that the Assembly



considers renewing the mandate of the IGC, and we hope to avoid a situation where renewal of the IGC mandate cannot be agreed, thereby terminating its existence.

We hope to continue this dialogue with your representatives in Geneva during the General Assemblies. We encourage the participation of Heads of IP Offices and/or Foreign Affairs Ministries of your government to ensure a speedy and adequate resolution of the matter.

18. NON-PAPER: The following text can be placed into a non-paper and provided to host country officials at the same time as delivery of the demarche.

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#### COMMENTS ON THE WIPO 2010-2011 PROGRAM AND BUDGET

Program and Budget Committee meetings at the World Intellectual Property Organization (WIPO) are scheduled for September 14-16, 2009. The focus will be to establish WIPO's budget for the 2010 and 2011 biennium. Based on interventions made by delegations during the July 20-22 informal budget meetings, consensus could be difficult to reach on adoption of a budget.

Agreement by Member States at the program and budget meetings in September is necessary so that the budget can be passed and WIPO can implement programs that are essential in fostering innovation and economic development for all Member States, including developing and least developed countries.

In particular, the following positions that threaten to hamper consensus are those that seek to:

Micromanage the Director General's role in coordinating the Development Agenda and the use of extra-budgetary resources;

Alter the mandate of the work of substantive committees, which is not the responsibility of the Program and Budget Committee but the responsibility of the General Assembly and the actual committees themselves; and

Go against the policy of not using reserve funds for recurring program expenditures, rather than one-time capital and other extraordinary expenditures. The Development Agenda-related programs are considered recurring expenditures as these programs are at the heart of WIPO's on-going activities and objectives, and should be funded through regular organization appropriations.

#### Development Agenda

On the Director General's role in coordinating the implementation of the 45 Development Agenda recommendations, the DG has indicated that he will continue to remain actively involved in WIPO's implementation of the Development Agenda even though a new structure has been created to ensure that the 45 recommendations are mainstreamed and coordinated in the Organization. The new structure, called the Development Agenda Coordination Division (DACD), coordinates the implementation of the Development Agenda recommendations within WIPO; is the interface with external stakeholders; and promotes better understanding of the Development Agenda and its benefits. The DACD reports directly to the new Deputy Director General for Development (Mr. Geoffrey Oneyama) of the Organization.

To replace the DACD with the DG to coordinate the Development Agenda would be unproductive, as this is an internal WIPO staff coordination issue, not an intellectual property policy issue requiring Member State approval. Further, such demands may hamper the broad, multi-level coordination of the Development Agenda which is sought by Member States, including developing countries, and would be created under

the new DACD structure.

In addition, Member States should seek to avoid debate on the development of guidelines for the use of extra-budgetary resources. There appears to be some concern from certain countries that such resources will be used to fund development agenda projects, and that Member States should therefore embark on developing specific guidelines for WIPO concerning the use of these funds. The income which WIPO generates through its fee-based registration services largely funds Development Agenda programs. As noted in the draft Program and Budget document, extra-budgetary resources will only be used in the context of a specific Development Agenda recommendation that seeks to increase donor activity for LDCs in the IP and development arena.

Demands that guidelines be developed on how WIPO uses extra budgetary resources are unnecessary since the Development Agenda is a recurring cost for WIPO and therefore cannot rely on non-fixed, voluntary resources such as donations. Further, such demands are unproductive, as the manner in which extra budgetary resources are used are established by WIPO's Financial Division. Based on WIPO's Financial Rules and Regulations (Rule 103.1), only in the case where the use of these funds would trigger a liability issue for the Organization is Member State approval required.

On the use of reserve funds to increase the allotment of resources for the Development Agenda, the proposed budget for the Development Agenda projects, which includes the implementation of eight recommendations that have been approved by Member States, is over 11 million CHF. Development activities that are occurring throughout the various programs in WIPO are over 117 million CHF, which is over 19 percent of the proposed budget. A significant level of funding is already available for the Development Agenda.

Demands that the reserve funds be used for Development Agenda projects are unnecessary as the project managers who are appointed with responsibility to implement individual projects have noted the human and financial resources required to implement these projects. These budgets are then approved throughout the Organization, including the Development Agenda Coordination Division and the Director General. Based on the financial data provided to the Committee on IP and Development (the committee responsible for overseeing implementation of the 45 recommendations) and the Program and Budget Committee, the budgets for eight recommendations have been allotted in the draft budget without requesting the use of reserve funds.

Moreover, the use of reserve funds for non-capital expenditures would not be fiscally responsible. To date, WIPO is receiving less funding from fee paid services to the private sector due to the economic crisis. In addition, WIPO will have to fully implement new UN accounting standards\*International Public Sector Accounting Standards (IPSAS) during the course of 2010. This implementation will require a significant overhaul of WIPO's accounting and finance system, which will have significant budgetary implications on WIPO's reserves. These two additional variables will impact the level of reserves and their magnitude remains unclear at this time. As a result, WIPO's reserves should be preserved for these kinds of extraordinary expenditures.

#### Standing Committee on Copyrights and Related Rights

With respect to proposed amendments to program descriptions in the draft 2010-2011 Program and Budget, amendments have been suggested in the program area dealing with copyrights and related rights to include work on access to educational materials. While the issue of access to educational materials has been raised in the WIPO Standing Committee on Copyrights and Related Rights (SCCR) and is currently highlighted in the draft Program and Budget as an issue under debate in the SCCR, Member States have not reached consensus on the degree and scope of work on this issue. Currently,

the SCCR is examining a narrow issue concerning improving the access of copyrighted works for visually impaired persons and have not agreed to broaden the scope to include increasing access to educational materials for all people.

An amendment to include a new focus on access to educational materials is prejudicial to the on-going discussions that are occurring in the SCCR.

Related to this, Member States have raised concerns about suggested amendments in the copyright program area for workshops and additional studies on copyright limitation and exceptions concerning distance education and trans-border distribution of copyrighted materials. The distance education and trans-border issues have also been raised at the SCCR. While a study has been approved by the SCCR, Member States have not agreed to any workshops or further studies on these issues.

The mandate of the SCCR should remain within the purview of the SCCR and not the Program and Budget Committee.

#### Standing Committee on Patents

There are also concerns about suggested amendments in the patent program area and other areas to include a specific focus on countries utilizing legislative flexibilities<sup>8</sup> provided in the WTO Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), as well as a specific reference in the traditional knowledge program area to accelerate work through intercessional meetings of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (GRTKF). Both issues are currently being debated in the relevant substantive committees at WIPO, and therefore no agreement has been reached on whether or how the committees will ultimately address these issues.

Specific "TRIPS flexibilities" have been identified in a non-exhaustive list of future work for discussion in the Standing Committee of Patents. In addition, the Committee on IP and Development has also discussed on-going WIPO technical assistance activities concerning legislative assistance on the use of legal options and flexibilities, consistent with rights and obligations under the international IP legal framework.

While the draft Program and Budget document references the complexity in which "TRIPS flexibilities" operate in the patent system, there is no mandate created for specific work or activity on "TRIPS flexibilities".

Successful agreement by Member States on these and other issues at the September 14-16 Program and Budget Committee will ensure approval of a balanced budget to be ultimately sent for further approval to the General Assembly the week of September 22, 2009.

#### COMMENTS ON THE RENEWAL OF IGC MANDATE

The week of the General Assembly at WIPO will be very busy, especially since the question of the renewal of the IGC's (GRTKF committee) mandate has been left to General Assembly.

The IGC recently completed its fourteenth session. During the session, although there was general consensus within the Committee that the mandate should be renewed, the Committee was unable to agree upon the terms for renewal of the mandate.

Specifically, the negotiations collapsed when it became clear that the key elements of the African Group proposal that call for a legally-binding international instrument for the protection of GRTKF to be negotiated, concluded and signed by Member States in 2012 were non-negotiable.

Member States should recall that the IGC has not reached agreement on the scope and contents for such a text, yet the African Group proposal sought to arrive at a conclusion on



the legally-binding nature of a text.

Reaching consensus on renewal of the Committee's mandate is essential so that progress can be made on the preservation, promotion and protection of traditional cultural expressions, traditional knowledge and genetic resources.

Many delegations were deeply disappointed that WIPO Member States were unable to arrive on agreed text to renew the mandate of the IGC. No outcome of the IGC should be excluded, including the possible adoption of a legally binding international instrument. Equally important, no outcome should be prejudged.

Member States should work together to ensure that the Assembly considers renewing the mandate of the IGC, thereby avoiding a situation where renewal of the IGC mandate cannot be agreed, thereby terminating its existence.

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END OF NON-PAPER  
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